Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

COMMENTS OF RURAL CELLULAR ASSOCIATION

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SUMMARY

The "net neutrality" *Notice of Proposed Rulemaking* adopted by the Commission, the latest step in a longstanding policymaking process regarding the Internet, affords the public an opportunity to comment on a wide range of issues regarding broadband Internet access services. The Rural Cellular Association is generally supportive of the proposals made in the *Notice*, which are intended to preserve the Internet as an open platform that will continue to provide valuable benefits to the Nation.

In its Comments, RCA focuses on several issues that are important both to the Commission's goal of preserving an open Internet and to the objective of ensuring that broadband Internet access service providers—and especially small and regional mobile wireless broadband providers—are given sufficient flexibility by the Commission's rules to enable them to manage their networks efficiently and meet the needs of their customers.

Non-Discrimination Requirement.—A non-discrimination requirement will help advance the Commission's open Internet goals because it will police the activities of broadband Internet access service providers with market power who otherwise could operate their networks and provide services in ways that would be anti-competitive and harmful to consumers. The Commission, however, should not adopt a "bright line" non-discrimination requirement, but instead should prescribe an "unjust or unreasonable discrimination" standard, based upon Section 202(a) of the Communications Act of 1934. The "unjust or unreasonable" standard would work effectively to distinguish between socially beneficial and socially harmful discrimination, and also would serve better than a bright-line test in achieving the Commission's objective of designing "an appropriately light and flexible policy to preserve the open Internet."

The Commission should apply its non-discrimination requirement only in circumstances in which broadband Internet access service providers have sufficient market power to engage in

pricing and service quality discrimination that will have socially harmful effects. Thus, the requirement should not be imposed on small and regional mobile wireless broadband Internet access service providers, because these providers lack sufficient market power.

Reasonable Network Management Practices.—RCA generally supports the proposed definition of "reasonable network management," and also supports the Commission's approach regarding several specific network management issues raised in the *Notice*. For example, RCA agrees that broadband Internet access service providers should be able to address harmful traffic or traffic unwanted by users as a reasonable network management practice, and that the Commission should not adopt the unnecessarily restrictive definition of "reasonable network management" articulated in the *Comcast Network Management Practices Order*. RCA also makes several recommendations regarding ways in which the Commission should tailor its definition of reasonable network management practices in order to accommodate unique issues faced by mobile wireless broadband Internet access service providers, including scarce spectrum resources, network congestion, and electromagnetic interference.

Handset Locking.— Handset locking is an anti-competitive practice that prevents mobile wireless service consumers from switching between service providers, and that also reduces or eliminates the value of a customer's "locked" handset since it can only be used on the network of the carrier imposing the lock. Since the Commission concedes that its proposed "any device" rule would not necessarily prohibit "handset locking," RCA argues that the proposed rule should be expanded to ensure that all broadband Internet access service providers are subject to an across-the-board prohibition against handset locking.

Transparency Requirements.—The Commission has taken a reasonable approach in designing information disclosure requirements applicable to network management and related

practices, providing flexibility that gives broadband Internet access service providers reasonable latitude in complying with the new requirements. RCA also encourages the Commission to work with the industry to establish voluntary "safe harbor" industry standards that—if satisfied—would guarantee a service provider's compliance with the transparency requirements.

Enforcement.—The Commission should enforce its "net neutrality" rules through formal complaint mechanisms that are already codified in the Commission's rules. Under these procedures, prescribed pursuant to the Commission's authority under Section 208 of the Act, complainants would bear the burden of proof. The Commission also should avoid establishing any procedural rules for complaints that vary based on the characteristics of the defendant or the technology used in the defendant's broadband network.

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Rural Cellular Association ("RCA"),[1] by counsel, hereby submits comments in response to a Notice of Proposed Rulemaking adopted by the Commission regarding draft rules to preserve an open Internet.[2]

I. INTRODUCTION.

As Chairman Genachowski has observed, the Internet has brought extraordinary benefits to the Nation, and the open design of the Internet has enabled it to serve as "an unparalleled platform for innovation and investment, an engine for job creation and economic growth, and a vibrant forum for civic engagement."[3] The task the Commission has set for itself is to preserve this openness. The *Notice* maps out a proposed course of action to accomplish this task.

RCA applauds the Commission for undertaking this initiative, and generally endorses the proposals presented by the Commission in the *Notice*. "Given the fact that the [*Internet*] *Policy*

[1] RCA is an association representing the interests of nearly 100 regional and rural wireless licensees providing commercial services to subscribers throughout the nation and licensed to serve more than 80 percent of the country. Most of RCA's members serve fewer than 500,000 customers.

[2] *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) ("*Notice*"). Comments on the *Notice* are due not later than January 14, 2010, and reply comments are due not later than March 5, 2010.

[3] *Id*. at 13153 (Statement of Chairman Julius Genachowski).

Statement has been a durable mechanism for preserving and promoting the interest of consumers in an open, interconnected public Internet[,]"[4] RCA supports the Commission's proposal to codify in its rules the principles encompassed by the *Internet Policy Statement*. RCA also endorses the Commission's efforts to build upon its prior efforts by launching this rulemaking proceeding, and by proposing to codify additional principles addressing the issues of non-discrimination and transparency.

The *Notice* deals in a thoughtful manner with a number of important concepts and issues, and the Commission's proposals will have a substantial impact on the future course of the Internet if they are adopted by the agency. RCA believes that the Commission should be praised for its effort "to create a balanced framework that gives consumers and providers of Internet access, content, services, and applications the predictability and clarity they need going forward while retaining [the Commission's] ability to respond flexibly to new challenges."[5]

Finally, RCA believes that the actions taken by the Commission in this proceeding almost inevitably will have a significant impact on broadband Internet access service providers' investment decisions, their access to financing, and their opportunities to engage in innovative efforts in the development of their services. This is especially true in the case of smaller and rural mo-

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[4] RCA Comments, *American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, NTIA Docket No. 090309298-9299-01, filed Apr. 13, 2009, at 43. The *Internet Policy Statement*, comprised of four general Internet policy principles, was announced by the Commission five years ago. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14987–88 (para. 4) (2005) ("*Internet Policy Statement*").

[5] *Notice*, 24 FCC Rcd at 13068 (para. 14).

bile broadband Internet access service providers. Because of this, the proposals and issues raised by the Commission should be subject to a cautious and deliberative review in this proceeding.

II. DISCUSSION.

In the following sections RCA addresses several issues presented in the *Notice* that RCA believes should be highlighted as the Commission works toward resolving the longstanding "net neutrality" debate. These issues include the adoption of a non-discrimination requirement, the Commission's definition of reasonable network management practices, the Commission's treatment of the "handset locking" problem, the Commission's proposed sixth principle requiring broadband Internet access service providers to disclose network management information, and the mechanisms the Commission should use to enforce rules adopted in this proceeding.

A. The Commission Should Adopt a Non-Discrimination Requirement.

RCA generally supports the adoption of a non-discrimination requirement applicable to broadband Internet access service providers because RCA believes that such a requirement will play an important role in achieving the goals enumerated by the Commission concerning the Internet. For example, the Commission indicates in the *Notice* that its policies should "promote investment and innovation with respect to the Internet,"[6] and a non-discrimination requirement applied to broadband Internet access service providers will help to ensure that Internet content, application, and service providers are not disadvantaged by restrictive, anti-competitive, or discriminatory practices. The discouragement or prevention of these practices will, in turn, promote investment and innovation by Internet content, application, and service providers.

Another goal highlighted by the Commission is "[p]romoting competition for Internet access and Internet content, applications, and services . . . ."[7] Ensuring that broadband Internet

[6] *Id*. at 13084 (para. 51).

[7] *Id*. at 13085 (para. 52).

access providers are not permitted to engage in harmful discriminatory practices will clear the path for competition to develop and expand, since competitive entry and the growth of robust competition can be stymied if broadband Internet access providers are able to engage in discriminatory practices intended to preserve and protect their market position.

A third goal identified by the Commission is the protection of users' interests.[8] Users are the ultimate beneficiaries of Commission policies that foster investment, innovation, and competition. A non-discrimination requirement—by promoting investment, innovation, and competition—will serve to protect users' interests.

RCA also believes that a non-discrimination requirement is an effective tool for the Commission to employ because it can directly address the presence of market power in the Internet environment. The Commission discusses the effects of market power in various contexts in the *Notice*,[9] illustrating the fact that, in the absence of protections against harmful discrimination, service providers capable of wielding market power can engage in practices that undercut the Commission's goals of promoting investment and innovation, promoting competition, and protecting Internet users.

In the following sections, RCA focuses on two issues raised by the Commission in connection with its non-discrimination proposal: how the non-discrimination requirement should be formulated, and how it should be applied in the wireless Internet context.

1. The Non-Discrimination Requirement Should Be Based on the Section 202(a) "Unjust or Unreasonable Discrimination" Standard.

The Commission's proposed rule regarding non-discrimination states that, "[s]ubject to reasonable network management, a provider of broadband Internet access service must treat law-

[8] *Id*. (para. 53).

[9] *See, e.g., id*. at 13092 (para. 69) (discussing the impact of high fees charged by broadband Internet access providers "with sufficient market share").

ful content, applications, and services in a nondiscriminatory manner."[10] Explaining that a key issue "is distinguishing socially beneficial discrimination from socially harmful discrimination in a workable manner[,]"[11] the Commission indicates that its use of the term "nondiscriminatory" in the proposed rule is intended "to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider . . . ."[12]

In describing the scope of the proposed non-discrimination rule, the *Notice* proposes "to focus on that portion of the connection between a broadband Internet access service subscriber and the Internet for which the broadband Internet access service provider . . . may have the ability and the incentive to favor or disfavor traffic destined for its end-user customers."[13] The Commission also states that an alternative to its proposed "bright-line rule against discrimination, subject to reasonable network management and enumerated exceptions"[14] would be to extend the common carrier standard to broadband Internet access service by prohibiting unjust or unreasonable discrimination by broadband providers.[15] The Commission requests comment on

[10] *Notice*, App. A, "Draft Proposed Rules for Public Input," Proposed Rule § 8.13.

[11] *Notice* at 13104 (para. 103) (footnote omitted).

[12] *Id*. at 13105 (para. 106).

[13] *Id*. at 13105 (para. 107).

[14] *Id*. at 13106 (para. 109). The enumerated exceptions would include the needs of law enforcement, public safety, and national and homeland security authorities. *Id*. at 13104 (para. 105). In addition, the Commission suggests that the non-discrimination rule may not apply to "managed" or "specialized" services. *Id*. at 13116 (para. 149). The Commission explains that managed or specialized services are "Internet-Protocol-based offerings (including voice and subscription video services, and certain business services provided to enterprise customers), often provided over the same networks used for broadband Internet access service, that have not been classified by the Commission." *Id*. at 13116 (para. 148).

[15] *Id*. at 13106 (para. 109).

whether the "unjust or unreasonable discrimination" standard would be preferable to the general non-discrimination rule the agency has proposed.[16]

RCA believes that two principal reasons support the adoption of an "unjust or unreasonable discrimination" standard, based upon Section 202(a) of the Communications Act of 1934 ("Act")[17] as the best means of preventing broadband Internet access service providers with market power from controlling access in ways that are detrimental to consumers and to Internet content, application, and service providers.

First, the "unjust or unreasonable discrimination" test would resolve effectively the key issue identified by the Commission: distinguishing socially beneficial discrimination from socially harmful discrimination. If discrimination by a broadband Internet access service provider is socially harmful, it is by definition unjust and unreasonable, and therefore would be prohibited. An example provided by the Nebraska Rural Independent Companies ("Nebraska Companies") is illustrative. The Nebraska Companies observe that, "if a network provider is vertically integrated with the development or distribution of content, there is a motivation for the provider to give preferential treatment to its own or affiliated content over independent content. The same is true for applications."[18] It would be reasonable to view this preferential treatment as socially harmful discrimination, since Internet content, application, and service providers, and ultimately consumers, would be harmed by such preferential practices. RCA agrees with the Nebraska Companies' indication that, "[i]n common carriage law, Congress expressly prohibited discrimination by affiliation for telecommunications carriers"[19] in Section 202(a) of the Act. Adopting an

[16] *Id*.

[17] 47 U.S.C. § 202(a).

[18] Nebraska Companies Comments, *Broadband Industry Practices*, WC Docket No. 07-52, filed June 15, 2007, at 5.

[19] *Id*. at 6 (footnote omitted).

"unjust or unreasonable discrimination" test would extend this prohibition to broadband Internet access service providers, thus preventing a socially harmful form of discrimination.

The Commission's objective is to formulate a non-discrimination test that prevents socially harmful discrimination "in a workable manner[,]"[20] and RCA believes that the "unjust or unreasonable discrimination" standard would meet this criterion. RCA agrees with the Commission's view "that a case-by-case approach to providing more detailed rulings in this area [*i.e.*, non-discrimination requirements] is inevitable and valuable."[21] This is the principal manner in which the scope and form of common carriage discrimination prohibitions have developed under Section 202(a), and, as the Commission suggests, a similar development of precedent would emerge to give definition to the agency's non-discrimination requirements in the context of broadband Internet access service.[22]

The second reason that the Commission should use an "unjust or unreasonable discrimination" standard is that such a standard would work better than the Commission's proposed "bright-line rule against discrimination"[23] in achieving "an appropriately light and flexible policy to preserve the open Internet."[24] An unqualified prohibition on discrimination would be restrictive and would likely lead to a ban on practices that in fact would not have any socially harmful

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[20] *Notice*, 24 FCC Rcd at 13104 (para. 103).

[21] *Id*. at 13106 (para. 110).

[22] BT Americas Inc. ("BTA"), in advocating that the Commission "should proscribe unjust and unreasonable discrimination by broadband access service providers with market power[,]" provides one example of how the "unjust or unreasonable discrimination" standard could be implemented. The Commission could allow broadband access service providers to discriminate in the manner in which data packets are managed and delivered on their systems and to charge for class of service ("CoS") and quality of service ("QoS") services, but could take steps to ensure that "the rates, terms and conditions of service offered by [such providers do] not unjustly and unreasonably discriminate amongst customers, including affiliates, to whom broadband services are offered." *See* BTA Comments, *Broadband Industry Practices*, WC Docket No. 07-52, filed June 15, 2007, at 16.

[23] *Notice*, 24 FCC Rcd at 13106 (para. 109).

[24] *Id*. at 13105 (para. 108).

consequences. The Commission implicitly recognizes this problem by seeking to ameliorate these undesirable effects of its proposed rule by making the test subject to a "reasonable network management" exception and to other enumerated exceptions.[25]

The problem with the Commission's proposed rule—even with its caveats and carved out exceptions—is that it would likely produce results that would be antithetical to the agency's goal of pursuing "light and flexible" Internet policies. The Commission tentatively concludes that its bright-line non-discrimination rule (subject to reasonable network management and specified exceptions):

> may better fit the unique characteristics of the Internet, which differs from other communications networks in that it was not initially designed to support just one application (like telephone and cable television networks), but rather to allow users at the edge of the network to decide toward which lawful uses to direct the network.[26]

It is not clear, however, why the use of an "unjust or unreasonable discrimination" test would somehow subvert the goal of enabling users to play an important role in driving the Internet's uses. On the other hand, when consideration is given to the question of whether an unjust or unreasonable discrimination test would permit socially beneficial discrimination that would be prohibited under a "bright-line" non-discrimination rule,[27] RCA believes the answer must be in the affirmative.

CTIA–The Wireless Association® ("CTIA") has provided one example of how this would be the case. Noting that "the hallmark of the discrimination prohibition in section 202 is the requirement that the alleged victims of discrimination be 'similarly situated[,]'"[28] CTIA argues

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[25] *Id*. at 13106 (para. 109).

[26] *Id*.

[27] *Id*. at 13107 (para. 114).

[28] CTIA Comments, *Broadband Industry Practices*, WC Docket No. 07-52, filed June 15, 2007 ("CTIA Broadband Industry Practices Comments"), at 20.

persuasively that this limitation "would be rendered meaningless" by a bright-line non-discrimination requirement.[29] CTIA points out that "[c]ustomers, content owners, application providers, and Internet service providers would all be lumped together and expected to be treated the same, even though these are very different and hardly similarly situated entities."[30] RCA agrees that the Commission's proposal to do away with the "similarly situated" qualification that is part of the Section 202(a) non-discrimination test would undermine the flexibility the Commission is seeking for its Internet policies.

Moreover, RCA agrees with AT&T's contention that a strict non-discrimination regulatory standard "would effectively mandate 'dumb' rather than 'smart' networks, inevitably resulting in stunted innovation, fewer consumer choices, and far less capable broadband networks across America."[31] AT&T explains that any strict non-discrimination standard:

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[29] *Id*. The treatment of bandwidth-intensive applications provides an example of how the "similarly situated" Section 202(a) qualification would work in an Internet context. As commentators have explained, if a network operator blocks all bandwidth-intensive applications, then it is acting on a non-discriminatory basis, because all similarly situated customers are treated the same. If, however, the broadband Internet access service provider permits the use of bandwidth-intensive applications from preferred content providers, but blocks bandwidth-intensive applications from other providers, then the service provider would be engaging in unjust or unreasonable discrimination because it would be treating similarly situated content providers (*i.e*., those using bandwidth-intensive applications) differently. *See* Robert W. Hahn, Robert E. Litan & Hal J. Singer, THE ECONOMICS OF "WIRELESS NET NEUTRALITY," AEI-Brookings Joint Center for Regulatory Studies, Related Publication 07-10, Apr. 2007, at 42 (included in CTIA Opposition, *Skype Communications S.A.R.L. Petition To Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks*, RM-11361, filed Apr. 30, 2007, Attach. E.).

The Commission seems to acknowledge the significance of the "similarly situated" test in its discussion of reasonable network management in the *Notice*, stating that "we believe that it would likely not be reasonable network management to block or degrade VoIP traffic but not other services that similarly affect bandwidth usage and have similar quality-of-service requirements." *Notice*, 24 FCC Rcd at 13113 (para. 137) (footnote omitted).

[30] CTIA Broadband Industry Practices Comments at 20.

[31] Letter from James W. Cicconi, AT&T, to Julius Genachowski, Chairman, FCC, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 12, 2010 ("Cicconi Letter"), at 1. AT&T's criticism was directed toward a proposal made by Free Press that the Commission's open Internet rules should ban all prioritization of access to subscribers of broadband Internet access service providers. Free Press has argued that the Commission's rules "must ensure equal treatment for all communications on the Internet regardless of their source, ownership, destination, application or content. No Internet packets should be given priority

> would illogically short circuit that virtuous cycle of investment and innovation. If [broadband Internet access service providers] cannot provide the network capabilities to make new applications work as intended, there will be less innovation at the edge and fewer services available to consumers. Dumbing down the commercially available capabilities of the network to the lowest common-denominator will hurt innovation and investment everywhere.[32]

Finally, in comparing its proposed approach to the use of an "unjust or unreasonable discrimination" test, the Commission states that, "[i]f we were to prohibit 'unjust or unreasonable' discrimination by broadband providers, we anticipate that the types of discrimination that would be considered 'just' and 'reasonable' would likely be reasonable network management or fall within one of the [described] exceptions . . . ."[33] RCA suggests that it would make more sense to turn this analysis around, and conclude that there is no need to replace the Section 202(a) unjust or unreasonable discrimination formulation with a new approach, because the Commission's bright-line test would likely produce results similar to those produced by the Section 202(a) requirement, with the important exception that the bright-line test would likely prohibit certain socially beneficial forms of discrimination that would be permitted by the "unjust or unreasonable discrimination" standard.

In order to effectuate the approach it is recommending in these Comments, RCA suggests that the Commission should revise draft Rule § 8.13 to read as follows:

§ 8.13 Nondiscrimination.

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over others—whether the priority comes in the form of access, latency or bandwidth." S. Derek Turner, DISMANTLING DIGITAL DEREGULATION: TOWARD A NATIONAL BROADBAND STRATEGY 76 (May 2009), accessed at http://www.freepress.net/node/57029.

[32] Cicconi Letter at 4.

[33] *Notice*, 24 FCC Rcd at 13106 (para. 110).

> A provider of broadband Internet access service must not make any unjust or unreasonable discrimination in its treatment of lawful content, applications, and services.[34]

2. Any Non-Discrimination Requirement Adopted by the Commission Should Not Apply to Smaller and Rural Mobile Wireless Service Providers.

In its discussion of the applicability of its proposed network neutrality principles to mobile wireless, one issue raised by the Commission is the extent to which a non-discrimination requirement should be applied to wireless services.[35] In RCA's view, whether the Commission decides to impose a bright-line non-discrimination requirement, as it has proposed, or to impose an "unjust or unreasonable" test or some other non-discrimination standard, any discrimination requirement should not be applied to smaller and rural mobile wireless service providers that are not in a position to exert any market power in their provision of broadband Internet access services.

The Commission pointed out in the *Notice* that the exercise of market power could produce socially harmful results:

> Where effective competition is lacking (*i.e.*, where broadband Internet access service providers have market power), it is more likely that price and quality discrimination will have socially adverse effects. Broadband Internet access service providers possessing market power may have an incentive to raise prices charged to content, application, and service providers and end users. Not only would that harm users overall, but it could reduce innovation at the edge of the network and cause some end users to decide not to subscribe to broadband Internet access service.[36]

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[34] In comparison, the rule proposed by the Commission states: "Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner."

[35] *See Notice*, 24 FCC Rcd at 13123 (para. 171) (stating that "[w]e seek comment on . . . to what extent the prohibition on discrimination . . . should be administered for wireless services").

[36] *Id*. at 13093 (para. 70). *See also* Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality and the Quest for a Balanced Policy*, 1 INT'L J. OF COMM. 644, 645 (2007) ("Can we limit how network operators can discriminate in a manner that [1] prevents them from fully exploiting *market power* in ways

When one considers mobile wireless competition, it is reasonable to say (as RCA has observed in recent filings with the Commission) that only the Big 4 carriers—or only the Big 2 carriers—have the ability to exert market power.[37] Recent estimates suggest that the Big 4 carriers (AT&T Mobility, Verizon Wireless, T-Mobile, and Sprint) "serve about 90 percent of U.S. wireless subscribers"[38] and that AT&T Mobility and Verizon Wireless "account for about 60 percent of subscribers nationwide."[39] Verizon Wireless recently reported 87.7 million customers, while AT&T Mobility indicated in a recent report that it has 79.6 million subscribers.[40] As RCA has noted, most of its members have less than 500,000 subscribers.[41] Verizon Wireless, in the wake of its acquisition of Alltel, provides coverage to at least 98.4 percent of the total U.S. population.[42]

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that seriously harm users, and [2] does not prevent them from using discrimination in ways that greatly benefit users?") (emphasis added), *quoted in Notice*, 24 FCC Rcd at 13104 (para. 103, n.226).

[37] *See e.g.*, RCA Comments, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66, filed Sept. 30, 2009, at 4 ("It is reasonable to say that the mobile wireless marketplace is comprised of the Big 4 carriers (or perhaps just Verizon Wireless and AT&T) and everybody else."). The discussion in the text regarding the current state of wireless competition is drawn largely from these RCA comments. *See id*. at 4-6. *See also* RCA Reply Comments, *Wireless Telecommunications Bureau Seeks Comment on Commercial Mobile Radio Services Market Competition*, WT Docket No. 09-66, filed July 13, 2009, at 10-11.

[38] Todd Shields & Amy Thomson, "FCC to Probe Competition in the Wireless Market (Update 4)," BLOOMBERG.COM, Aug. 27, 2009, accessed at http://www.bloomberg.com/apps/news?pid=20601110&sid=aMvcmY8AMvX8 ("Shields & Thomson").

[39] *The Consumer Wireless Experience: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 111th Cong., Written Statement of John E. Rooney, President & Chief Executive Officer, United States Cellular Corporation (June 17, 2009), at 2. Other estimates range as high as a 65 percent share. *See An Examination of Competition in the Wireless Industry: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong., Written Statement of Victor H. "Hu" Meena, President and Chief Executive Officer, Cellular South, Inc. (May 7, 2009), at 1-2.

[40] Shields & Thomson.

[41] See page 1, n.1, *supra*.

[42] Caressa D. Bennet, General Counsel, Rural Telecommunications Group, Inc., & David L. Nace, General Counsel, RCA, Ex Parte Filing, WT Docket No. 08-95, WT Docket No. 05-265, RM No. 11497, and RM No. 11498, filed Oct. 24, 2008, at 2.

This alarming concentration in the wireless marketplace has been fueled by recent acquisitions, license swapping, and spectrum license acquisitions in the Commission's auctions.[43] Many believe that these trends provide evidence that the state of wireless competition is in decline, and are concerned that the trends portend the reemergence of a duopoly that will have sufficient market power to dominate the mobile wireless marketplace.[44]

These concerns are magnified by data relating to subscriber additions in the wireless industry. Specifically, according to information recently released by various wireless carriers and compiled by Cellular South, Inc.,[45] "[a]s of the end of the third quarter of 2009, the two largest wireless service providers [AT&T Mobility and Verizon Wireless] were responsible for approximately 85% of the net subscriber additions in the wireless industry during 2009 . . . ."[46] AT&T added approximately 4.6 million customers and Verizon added approximately 3.7 million customers during the first three quarters of 2009, while T-Mobile added approximately 700,000 customers, MetroPCS added approximately 1 million customers, and Sprint lost approximately 1 million customers.[47]

The trends summarized in the preceding paragraphs suggest that there is a reasonable case for concluding that effective competition currently is lacking in the retail mobile wireless

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[43] *See* Cellular South, Inc., Comments, *Wireless Telecommunications Bureau Seeks Comment on Commercial Mobile Radio Services Market Competition*, DA 09-1070, WT Docket No. 09-66, Public Notice, filed June 15, 2009, at 3-4.

[44] *See, e.g.*, Letter from Senator Herb Kohl, Chairman, Subcomm. on Antitrust, Competition Policy and Consumer Rights, S. Comm. on the Judiciary, to Hon. Christine Varney, Assistant Attorney General – Antitrust Division, Department of Justice, and Hon. Julius Genachowski, Chairman, FCC, July 6, 2009, at 1 (noting that members of the subcommittee "have become concerned with emerging barriers to competition in an already highly concentrated [wireless] market.").

[45] *See* Letter from David L. Nace, Counsel for Cellular South, Inc., to Marlene H. Dortch, Secretary, FCC, Notice of Oral Ex Parte Communication, WT Docket No. 05-265, WC Docket No. 05-337, GN Docket No. 09-51, GN Docket No. 09-137, WT Docket No. 09-66, filed Dec. 3, 2009.

[46] *Id*. at 2.

[47] *Id*., Table, "Q3 YTD 2009 Industry Net Adds."

marketplace. The market share, recent subscriber additions, and geographic reach of the largest two national carriers point to the ability of these carriers to exercise considerable market power, with other wireless carriers, especially smaller and rural carriers, finding it more and more difficult to compete.

Even if a more conservative view is taken regarding the current state of mobile wireless competition, MetroPCS has made a persuasive case regarding the market power of the Big 2 and the problems this poses for smaller and rural wireless carriers:

> A number of recent trends may serve to hinder, or outright restrict, [the] competitiveness and innovation [of the wireless industry] in the future. Indeed, with the strong drumbeat of wireless consolidation, where the industry once had a number of large regional carriers—such as Alltel Corporation, Rural Cellular Corporation, Dobson Communications Corporation, SunCom Wireless and Centennial Communications Corporation—many of these are now or soon will be gone. Meanwhile, the two largest companies—AT&T and Verizon Wireless—seem bent on a course to recreate the cellular duopoly . . . with smaller and rural wireless carriers having to compete against two industry behemoths on an unlevel playing field.[48]

When the current state of competition in the mobile wireless marketplace, and the trends that will affect wireless competition, are taken into account, there is a strong basis for concluding that there is no need to impose any non-discrimination requirements on smaller and rural wireless carriers to the extent they provide broadband Internet access services. Although there is considerable evidence suggesting that the Big 2 wireless carriers have sufficient market power to engage in socially harmful discrimination in connection with their provision of broadband Internet access services in the absence of non-discrimination requirements, there is no basis for a similar concern with regard to smaller and rural wireless carriers.

[48] MetroPCS Communications, Inc., Comments, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66, filed Sept. 30, 2009, at 3-4.

In these circumstances, applying non-discrimination requirements to the provision of broadband Internet access services by smaller and rural mobile wireless carriers would not serve any useful policy objectives, since there is little reason to suspect that the end-user customers of these service providers (or content, application, and service providers) would be harmed in the absence of such requirements. On the other hand, forcing smaller and rural mobile wireless carriers to adhere to non-discrimination requirements—especially the bright-line rule against discrimination proposed by the Commission—could interfere with the ability of these service providers to maintain their position in the wireless marketplace.

Finally, the Commission, in considering the application of non-discrimination requirements to wireless, also seeks comment on "time frames or phases that would facilitate fair and appropriate application of the nondiscrimination principle to mobile wireless broadband Internet access services."[49] If the Commission decides to impose a non-discrimination requirement on smaller and rural wireless carriers, then RCA urges the Commission to delay the effective date of the requirement for at least two years (relative to the effective date applicable to other broadband Internet access service providers).

Delaying the effective date for at least two years for small and regional wireless carriers would enable the Commission to monitor the ongoing trends in the mobile wireless marketplace that are being driven by acquisitions, mergers, license swapping, and spectrum license acquisitions in the Commission's competitive bidding proceedings. If these consolidation trends continue, then the Commission may find it necessary to reconsider the advisability of allowing a non-discrimination requirement applicable to smaller and rural mobile wireless carriers to take effect.

[49] *Notice*, 24 FCC Rcd at 13123 (para. 171).

B. The Commission Should Provide for Sufficient Flexibility in Developing Reasonable Network Management Practices, Especially in the Case of Mobile Wireless Broadband Service Providers.

The Commission seeks comment on its proposed definition of "reasonable network management," indicating that it seeks to craft a definition that takes into account what appear to be "several types of situations that could justify a broadband Internet access service provider's acting inconsistently with the six open Internet principles" proposed by the Commission.[50] In the following sections, RCA discusses several specific aspects of the Commission's proposed definition, and then turns to the issue of the need for the Commission to tailor its definition to meet the unique characteristics of mobile broadband that pose special challenges to mobile wireless broadband Internet access service providers' efforts to manage their networks and serve their customers.

1. RCA Generally Supports the Commission's Proposed Definition of Reasonable Network Management.

The Commission's proposal for defining "reasonable network management" generally takes a reasonable approach in balancing the overall goal of Internet openness with the need to take account of various circumstances in which open Internet principles should give way because of other legitimate concerns that are relevant to the way in which Internet networks are operated. While RCA does not agree with parties who have suggested that regulation of broadband network practices is unworkable and therefore should not be attempted,[51] RCA urges the Commission to use a "light touch" and to provide mobile wireless broadband Internet access service pro-

[50] *Id*. at 13113 (para. 136).

[51] *See, e.g*., Verizon and Verizon Wireless Comments, *Vuze, Inc., Petition To Establish Rules Governing Network Management Practices by Broadband Network Operators, Free Press, et al., Petition for Declaratory Ruling Regarding Broadband Industry Practices*, WC Docket No. 07-52 ("*Vuze-Free Press Proceeding*"), filed Feb. 13, 2008, at 20.

viders with sufficient flexibility to adapt their network management practices to meet continually changing demands placed upon these networks and to be responsive to customers' needs.

In the following paragraphs, RCA addresses several specific issues related to the Commission's proposal, and then, in the next section, RCA discusses special considerations that are relevant to mobile wireless broadband.

First, RCA supports the Commission's proposal that broadband Internet access service providers should be able to address harmful traffic or traffic unwanted by users as a reasonable network management practice.[52] For example, as the Commission notes, blocking spam and malware should be treated as a reasonable network management practice, because doing so provides a benefit to end-user customers who are plagued by spam, malware, and "malicious traffic originating from malware . . . ."[53] RCA believes that its member carriers can better serve their customers if they have the flexibility to manage their networks in ways that reduce or eliminate harmful or unwanted traffic targeted for their customers. Regulatory requirements that would interfere with this flexibility should not be adopted.

RCA therefore opposes a suggestion recently made by Public Knowledge that reasonable network management should be treated "as an exclusively technical exception" and "should be reserved for actions taken to maintain the integrity and functionality of the network."[54] To the extent that the approach proposed by Public Knowledge would prevent broadband Internet ac-

[52] *Notice*, 24 FCC Rcd at 13114 (para. 138).

[53] *Id*. *See* Verizon and Verizon Wireless Comments, *Vuze-Free Press Proceeding*, at 19 (indicating that, "[g]iven the resourcefulness of those responsible for these threats [*e.g*., viruses, spyware], broadband providers' tactics in protecting their subscribers and their networks must constantly evolve").

[54] Letter from Sherwin Siy, Deputy Legal Director, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, Notice of Ex Parte Presentation, GN Docket No. 09-191, WC Docket No. 07-52, filed Dec. 17, 2009, at 2.

cess service providers from blocking spam, malware, and other harmful traffic or traffic unwanted by users, the proposal should be rejected.

Second, in discussing its formulation of a reasonableness test for its network management definition, the Commission explains that it is proposing not to adopt a proposal in a past adjudication that a network management practice would be considered reasonable only if it "further[s] a critically important interest and [is] narrowly or carefully tailored to serve that interest."[55] RCA agrees that the restrictive definition articulated in the *Comcast Order* should not be adopted because it would undercut the Commission's objective of treating reasonable network management as a "flexible category . . . ."[56] Broadband Internet access service providers should have this flexibility to better serve their customers and protect the operation of their networks.

Third, the Commission seeks comment on the question of who should bear the burden of proof on the issue of whether particular network management practices fall into one or more of the definitional categories proposed by the Commission.[57] The Commission should take the same approach that is taken with respect to formal complaints. "It is well established that the complainant has the burden of proof in a formal complaint proceeding under Section 208 of the Act. Thus, to prevail, a complainant must demonstrate by a preponderance of the evidence that the alleged violation of the Act or the Commission's rules actually occurred."[58]

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[55] *Notice*, 24 FCC Rcd at 13114 (para. 137) (quoting *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13055-56 (para. 47) (2008) ("*Comcast Order*")).

[56] *Notice*, 24 FCC Rcd at 13114 (para. 137).

[57] *Id*. at 13114 (para. 141).

[58] *Paul DeMoss v. Sprint Communications Company*, 23 FCC Rcd 5547, 5550 (para. 15) (Enforcement Bur. 2008) ("*DeMoss Order*") (footnotes omitted). See Section II.E., *infra*.

If any party alleges that a broadband Internet access service provider is engaging in a practice that violates the Commission's rules because the practice does not fall within the agency's definition of a "reasonable network practice," then the complaining party should bear the burden of backing up its allegation.

2. The Commission Should Take Special Considerations into Account in Identifying Reasonable Network Management Practices for Mobile Broadband.

The Commission seeks comment on various issues regarding what should be considered reasonable network practices in the context of wireless broadband networks, including the ways in which various wireless characteristics "affect what kinds of network management practices are or are not reasonable[.]"[59] As a threshold matter, RCA agrees with CTIA that the Commission, as it addresses the task of developing reasonable network management standards, should keep in view the fact that "carriers do not manage [broadband] networks to the benefit of carriers, but rather to the benefit of consumers."[60] This dictum should guide the Commission in addressing issues that call for the development of a definition of "reasonable management practices" that accommodates wireless broadband network operations and thus enables wireless broadband Internet access service providers to better serve their customers. RCA addresses several of these issues in the following paragraphs.

First, the Commission should not adopt specific, across-the-board rules and standards governing what constitute "reasonable management practices," but instead should rely on a case-by-case, precedential approach similar in nature to the mechanism the Commission is envisioning for its enforcement of a non-discrimination standard.[61] As Wireless Communications Asso-

[59] *Notice*, 24 FCC Rcd at 13123 (para. 173).

[60] CTIA Comments, *Vuze-Free Press Proceeding*, filed Feb. 13, 2008, at 2.

[61] *See Notice*, 24 FCC Rcd at 13106 (para. 110).

ciation International, Inc. ("WCA"), has observed, reasonable network management "is very fact-specific" and, therefore, "the reasonableness of any particular network management practice cannot be sensibly evaluated in the vacuum of industry-wide rules that apply without regard to the underlying facts."[62]

Second, the Commission's definition of reasonable network practices, in the case of mobile wireless broadband providers, should account for the fact that mobile wireless broadband networks utilize a scarce spectrum resource, and that wireless "voice and data users share the same network capacity."[63] Problems of network congestion are particularly acute for mobile wireless broadband networks. As Verizon and Verizon Wireless have observed:

> In the case of mobile broadband services, the spectrum available from a single cell tower is both limited and shared, thus raising [this] concern: Because wireless devices use a shared spectrum resource, every device and every site operating on the network has a specific and calculable impact on the aggregate resources available to all consumers attempting to access a given carrier's resources in a given geographic area.[64]

Because of these unique characteristics of mobile wireless broadband networks, the Commission, as much as possible within the parameters of a general definition of reasonable

[62] WCA Comments, *Vuze-Free Press Proceeding*, filed Feb. 13, 2008, at 5. *See* CTIA Comments, *Vuze-Free Press Proceeding*, at 16-17; Verizon and Verizon Wireless Comments, *Vuze-Free Press Proceeding*, at 19 (noting that "a provider's particular network architecture (*e.g.*, the location of likely 'choke points' at times of congestion), capacity constraints, and the provider's mix of services will affect both its need for network management and the available alternatives"); AT&T, Inc., Comments, *Broadband Industry Practices*, WC Docket No. 07-52, filed June 15, 2007, at 36-37 (stating that "to meet the complex and changing needs of their customers, providers use many network-management techniques, often in combination, and there is no single 'right' way to manage a network or service. Applications providers and network engineers alike need all the tools in their toolbox to satisfy those preferences as quickly and efficiently as possible.").

[63] CTIA Comments, *Vuze-Free Press Proceeding*, at 2.

[64] Verizon and Verizon Wireless Comments, *Vuze-Free Press Proceeding*, at 33 (internal quotations omitted).

network practices, "should continue to allow carriers to individually manage their networks as they see fit for the continued benefit of consumers."[65]

Third, the "uncertainty of the wireless environment"[66] poses challenges to mobile wireless broadband Internet service providers that should be taken into account as the Commission seeks to adopt rules addressing reasonable network management. A particularly problematic uncertainty is electromagnetic interference, which is a constant threat in a shared spectrum environment. The Commission's rules should protect "[c]arrier-specific network management practices, tailored to their individual networks and the technologies they support, [that] are essential to interference mitigation and maximizing the user experience."[67]

Finally, the Commission should exempt those networks in remote parts of the country that necessarily rely on satellite technology for backhaul transport to the Internet backbone. Capacity constraints imposed by satellite backhaul make it difficult to provide affordable mass market Internet service, even at bandwidths that are not much higher than traditional dial-up service.[68] Foreclosing network management tools will impede the ability of satellite-dependent carriers to provide even modest Internet service. Unreliable connectivity to consumers in these remote, isolated areas will have a profound, negative impact.

C. The Commission Should Adopt an "Any Device" Rule That Would Make the Practice of "Handset Locking" Illegal.

RCA has a particular interest in the Commission's development of rules and policies supporting the principle stating, in part, that "consumers are entitled to connect their choice of legal

[65] CTIA Comments, *Vuze-Free Press Proceeding,* at 3.

[66] *Id*. at 10.

[67] *Id*.

[68] The Commission has already recognized that it would be unnecessary and unwise to apply its principles to traditional dial-up service. *Notice*, 24 FCC Rcd at 13101 (para. 91, n.209).

devices that do not harm the network."[69] RCA has played a key role in asking the Commission to address the harms caused to consumers and smaller competitors by banning exclusive handset arrangements between wireless service providers and device manufacturers and looks forward to the separate proceeding that the Commission indicates it will initiate on the issue.[70] This proceeding provides an opportunity for RCA to articulate its position on "handset locking."[71]

The Commission states that its "any device rule" proposed in the *Notice* would not *necessarily* prohibit the practice of handset locking—in contrast to the rules that the Commission adopted for Upper 700 MHz C Block licensees where the agency explicitly prohibited licensees from engaging in the practice of "handset locking."[72] RCA believes strongly that the Commission should prohibit *broadband Internet access service* providers (and other providers over which the Commission has jurisdiction) from engaging in the practice of "handset locking." Handset locking is an obviously anti-competitive practice by which carriers prevent consumers from easily switching providers while simultaneously reducing or eliminating the value of the "locked" handset since it can only be used on the carrier's network implementing the lock.[73]

In proceeding to expand and codify its "net neutrality" principles and "build upon the existing record at the Commission to identify the best means to achieve [its] goal of preserving and

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[69] *Id*. at 13061 (para. 5).

[70] *Id*. at 13123 (para. 170).

[71] *Id*. at 13122 (para. 169).

[72] The Commission defines "handset locking" as the practice of "preventing a subscriber from transferring a handset to another provider's network during the time the contract with the subscriber is in place . . . ." *See id.*

[73] *See* Letter from Christopher Murray, Legislative Counsel, Consumers Union, to the Honorable Michael Powell, Chairman, FCC, filed Mar. 11, 2004 ("We are asking the Commission to stop carriers from disabling otherwise functional and compatible phones when consumers change networks. We are asking the Commission to prevent wireless companies from sabotaging consumers' phones simply for the purpose of impeding competition, by making it more expensive for consumers to switch.").

promoting the open Internet,"[74] the Commission explains that it seeks "to do so in a manner that will protect the legitimate needs of consumers, broadband service providers, entrepreneurs, investors, and businesses of all sizes that make use of the Internet."[75] The Commission's goals will be closer to being realized by adopting rules that prohibit the practice of handset locking and by banning exclusive device arrangements between service providers and manufacturers..

D. RCA Supports Commission Action To Codify a Sixth Principle of Transparency.

In the *Notice*, the Commission proposes to codify a sixth principle of transparency, seeking comment on the issue of "how broadband Internet access service providers should disclose relevant network management practices to consumers as well as to content, application and service providers and to government."**[76]** There is no question that broadband providers can do better and the proposed sixth principle is an indication that the Commission believes the same. That said, the Commission has not provided evidence in the *Notice* that the network management practices of Madison River Communications**[77]** and Comcast are commonplace and, as a result, must be careful not to micromanage the consumer-provider relationship.**[78]**

RCA believes that the language of the sixth principle is flexible enough to allow providers a reasonable amount of latitude in adhering to the principle. However, to further its transpar-

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[74] *Notice*, 24 FCC Rcd at 13067 (para. 10).

[75] *Id*.

[76] *See Notice*, 24 FCC Rcd at 13108-11 (paras. 118-132).

[77] *See Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enforcement Bur. 2005).

[78] *See* RCA Comments, *Consumer Information and Disclosure*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, filed Oct. 13, 2009, at ii ("If the agency concludes instead that regulations must be imposed, then it should avoid detailed requirements so that service providers will have the flexibility to provide the required information in a way that meets their own specific needs and those of their customers."); *see also Notice*, 24 FCC Rcd at 13110 (para. 126) ("…[T]oo much [consumer disclosure practices] detail may be counter-productive if users ignore or find it difficult to understand those details").

ency goals, the Commission should work with the industry (and their associations) to come up with voluntary "safe harbor" industry standards that—if satisfied—would guarantee a provider's compliance with the transparency principle. Such standards would likely need to include information regarding actual transmission rates and network management practices that could affect a consumer's quality of service.

Voluntary industry codes and standards have several advantages, including the fact that the codes can be modified and enhanced—more readily than government regulations—in order to respond to consumers' concerns and address emerging issues and problems. In the wireless marketplace, for example, the "front lines" of consumer concerns and problems are the myriad daily interactions between consumers and their wireless carriers. These interactions can illuminate patterns of customer concerns about the provision of service and provider practices. If alarm signals emerge, the flexibility afforded by voluntary mechanisms provides the industry with the ability to develop and implement new best practices that are responsive to the identified customer concerns. Another advantage of voluntary industry codes and standards is that industry "peer pressure" can make the standards effective.[79]

Of course, reliance on voluntary industry standards does not preclude subsequent regulatory action if the operation of the industry standards is shown to be ineffective in achieving the goals of consumer protection and empowerment. Thus, there would be little risk in the Commission's reliance on voluntary industry mechanisms, and RCA believes that the Consumer Code developed by the wireless industry provides an example of how such voluntary standards can be

[79] In the wireless industry, a carrier that certifies its compliance with the CTIA Consumer Code for Wireless Service ("Consumer Code") is entitled to display a Seal of Wireless Quality/Consumer Information reflecting its willingness to adhere to the industry's standards. This may have competitive implications, prompting other carriers to certify adherence to the Code in order to avoid any competitive disadvantage. In fact, CTIA has pointed out that carriers serving more than 94 percent of all wireless customers have implemented the Code.

effective in accomplishing pro-consumer goals and objectives. RCA stands willing and ready to assist the Commission in this endeavor.

The Commission must also keep in mind the burden—administrative and economic—that will be shouldered by providers in codifying its transparency requirements. Requiring providers to provide monthly or quarterly disclosures to users, other providers, or the government is a significant burden, particularly for small and mid-sized service providers. To the extent that the Commission decides to require providers to disclose their network management and other practices that affect a broadband user's experience, it should limit such notification requirements to an online format and require the provider to provide clear instructions on where interested parties—including the government for compliance monitoring purposes—can access the information. However, the Commission should not mandate the formatting or content of the information provided.

Finally, to the extent that the Commission has reason to believe that a provider is not complying with its transparency requirement, the Commission could seek additional information about a provider's compliance with the Commission's sixth principle—assuming this principle is codified—as opposed to imposing an annual certification or reporting requirement regarding a provider's compliance with the Commission's transparency or any other "net neutrality" requirement.

E. The Commission Should Require That All "Net Neutrality" Complainants Follow the Commission's Formal Complaint Procedures.

It is without question that if the Commission's "net neutrality" principles are codified, the Commission will then have the authority under Section 503(b) of the Act to issue citations and impose forfeiture penalties for violations of the Commission's rules.[80] RCA believes, however,

[80] 47 U.S.C. § 503(b).

that the Commission would be wise to require that "net neutrality" complainants be required to submit formal complaints, pursuant to 47 C.F.R. § 1.720 *et seq.*, should a party wish to register a complaint with the Commission regarding a provider's provision of broadband Internet access service. By so doing, the Commission will place the appropriate burden of proof on the complainant and avoid the otherwise likely scenario of having to resolve a potential endless number of frivolous, informal complaints—many of which would be waged against entities over which the Commission does not currently have jurisdiction.[81]

That said, the Commission should avoid creating procedural rules that differ depending on the characteristics of the defendant.[82] The Commission must be mindful of the convergence that is occurring in today's telecommunications marketplace. Competitive neutrality should be a guiding principle for the Commission in overseeing the entire marketplace and that neutrality should extend into the enforcement procedures. This does not mean that the Commission should refrain from considering and acknowledging the differences between small and large carriers by scaling enforcement investigations and actions appropriately based on the significance of the violation and the administrative and economic resources of a company, but rather that the procedures that parties in a complaint must follow should not vary based on technology or because of the characteristics of a defendant.[83]

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[81] The complainant has the burden of proof in a formal complaint proceeding under Section 208 of the Act. *See DeMoss Order*, 23 FCC Rcd at 5550 (para. 15) (citing *Directel, Inc. v. American Telephone and Telegraph Company,* File No. E-93-033, Memorandum Opinion and Order, 11 FCC Rcd 7554, 7560-61 (para. 14-15) (1996); *Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers,* CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497 (1997); *Amendment of Rules Concerning Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, CC Docket No. 92-26, Report and Order, 8 FCC Rcd 2614 (1993); *Connecticut Office of Consumer Counsel v. AT&T Communications,* File No. E-88-061, Memorandum Opinion and Order, 4 FCC Rcd 8130 (1989), *aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990), *cert. denied,* 499 U.S. 920 (1991)).

[82] *See Notice*, 24 FCC Rcd at 13124 (para. 176).

[83] *Id.*

III. CONCLUSION.

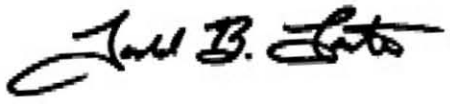
As the Commission considers steps it should take to preserve the openness of the Internet, with the goal of ensuring that the Internet continues to be a bountiful resource for the Nation, it should keep in mind Commissioner McDowell's observation that "the Internet is perhaps the greatest deregulatory success story of all time. It became successful not by government fiat, but by all interested parties working together toward a common goal."[84]

RCA is generally supportive of the initiatives proposed in the *Notice* because, for the most part, they adhere to the themes that the Commission should take a light-handed, flexible approach as it codifies existing Internet policy principles and develops new rules addressing non-discrimination and transparent network management and practices.

The Commission should avoid a "one size fits all" approach that ignores material differences in the networks and operations of various types of broadband Internet access service providers. To that end, RCA believes the Commission should modify its proposed approach in order to better reflect these themes of light-handed, flexible regulation, and the tailoring of requirements to fit the unique circumstances of different classes of service providers.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION



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[84] *Id*. at 13159 (Statement of Commissioner Robert M. McDowell, Concurring in Part, Dissenting in Part).